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No Opinion

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~431~~. 150

LUCIEN B. MAXWELL, JAMES L. JOHNSON, D. B. KOCH, C. S. HOPKINS, AND ALEXANDER VALLE, PLAINTIFFS IN ERROR,

VS.

ANDREW STEWART.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED APRIL 28, 1873.

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1 **TERRITORY OF NEW MEXICO:**

In the supreme court.

ANDREW STEWART
vs.
LUCIEN B. MAXWELL. } Debt on judgment.

Be it remembered that heretofore, to wit, on the 18th day of December, A. D. 1871, the following transcript was filed in the office of the clerk of the supreme court of the Territory of New Mexico, which said transcript is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

1st judicial district court.

ANDREW STEWART
vs.
LUCIEN B. MAXWELL. } Debt on judgment.

Be it remembered that heretofore, to wit, on the 19th day of March, A. D. 1870, the following petition was filed in the office of the clerk of 2 the district court for the first judicial district of the Territory of New Mexico, which said petition is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Colfax:

In the district court of the first judicial district, sitting in the county of Colfax and Territory of New Mexico, for the trial of causes arising under the laws of the Territory, at the April term, A. D. 1870.

To the Honorable Joseph G. Palen, chief justice of the supreme court of the Territory of New Mexico, and judge of the first judicial district court thereof.

Your petitioner, Andrew Stewart, a resident of the State of Ohio, complains of Lucien B. Maxwell, a resident of the county of Colfax, in the Territory of New Mexico, of a plea that he render to the said plaintiff the sum of seven thousand and fifty dollars and twenty-five cents, which he owes to and unjustly detains from him, for that whereas 3 the said plaintiff heretofore, to wit, on the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and sixty-five, in a district court held at the town of Council Grove, within and for the county of Morris and State of Kansas, and within the jurisdiction of said court, to wit, at the county of Colfax aforesaid, before the honorable judge of said court, at the November term, A. D. 1865, thereof, by the consideration and judgment of said court, recovered against the said defendant as well as the sum of seven thousand dollars which in and by the said were then and there adjudged to the said plaintiff for his damages which he had sustained by reason of the non-performance by the said defendant of certain promises and undertakings then lately made by the said defendant *by* the said plaintiff, as also the sum of fifty dollars and twenty-five cents for his costs and charges by him about his suit in that behalf expended, to the said plaintiff by the said court then and there adjudged, whereof the

4 said defendant was convicted, as more fully appears by the record and proceedings thereof, a copy whereof, duly authenticated, the said plaintiff now here in court produces and makes a part of his petition; which said judgment remains in full force and effect, not reversed, satisfied, or otherwise vacated, that is to say, at the county of Colfax aforesaid; and the said plaintiff hath not obtained any execution or satisfaction of or upon said judgment so recovered as aforesaid, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of seven thousand and fifty dollars and twenty-five cents so recovered as aforesaid, as also his damages for the unjust detention thereof; yet the said defendant, though often requested so to do, hath not as yet paid the said sum of seven thousand and fifty dollars and twenty-five cents, or any part thereof, to the damage of the said plaintiff three thousand dollars; therefore he
5 brings this suit, and asks judgment of this honorable court for said sum of seven thousand and fifty dollars and twenty-five cents, together with three thousand dollars damages for unjust detention thereof, and costs of suit.

S. B. ELKINS,
Attorney for Plaintiff.

Which said petion is endorsed as follows, to wit:
Filed in my office this 19th day of March, A. D. 1870.
W'M BREEDEN, *Clerk.*

And also on the same day was filed with said clerk the following transcript, which is in the words and figures following, to wit:

Title of cause.

ANDREW STEWART
vs.
LUCIEN B. MAXWELL.
No. 14.

Attorneys—Henningray, Gambell & Fitzwilliams, John Martin, Isaac Sharp.

6 Date, 1864.

September 13. Petition and precipe filed.
" 14. Summons issued.
" 14. Summons returned with the following endorsements:
" Not served on defendant; not found in my county.
" 13. A. PALMER, *Sheriff Morris County.*

" 13. Affidavit and bond in attachment filed.
Order of attachment issued.
14. Order of attachment returned with following endorsement:

Received this order of attachment September 14, 1864.

Sept. 14, A. D. 1864. I have this day attached, in presence of Charles Columbia and F. Ledrick, two freeholders of Morris County, the following goods and chattels, to wit, eight freight-wagons, ninety-six oxen, 45 yorks, 36 chains, 2 mules, 408 sacks corn contained in schedule hereto attached, belonging to the said Lucien Maxwell, and have caused the same to be appraised according to law by said freeholders, under oath, at the sum of $6,825.00 dollars, and have the same in my possession.

7 A. PALMER, *Sheriff.*

Nov. 8. Affidavit for publication filed.
Dec'r 21. Demurrer filed.
November 20. Answer filed.
November 24. Tried by court.
" 24. Judgment plaintiff for $7,000, and costs, and sale of attached property.
25. Motion for a new trial filed.
25. Motion overruled.

November term.—District court in and for Morris County, Kansas.

ANDREW STEWART
vs. No. 4.
LUCIEN B. MAXWELL.

And now, at this day, comes the plaintiff by his attorneys, J. C. Henningray, esq., and the defendant, by his attorney', John Martin, esq., and Isaac Sharp, esq., and this cause being called for trial, the petitioners herein announced themselves, by their attorneys, ready for trial, and the said cause having been heard upon the pleadings and evidence therein, and after argument of counsel, and due consideration by 8 the court, the said court now here doth find, from all the proof contained in the depositions submitted and the evidence of divers persons who were sworn and testified in open court on the trial, no testimony having objected to, the court finds the following facts, to wit:

1st. In answer to defendant's first requirements, there was a contract entered into between plaintiff and defendant as alleged in said plaintiff's petition.

II. In answer to defendant's second requirements, said contract in plaintiff's petition mentioned was made on or about the 21st day of October, A. D. 1863.

III. That on or about the 21st day of October, A. D. 1863, the plaintiff and defendant entered into a contract, by the terms of which the defendant agreed to deliver to the plaintiff, at Fort Union, New Mexico, about 400 head of beef cattle, or as many as would enable the plaintiff to comply with a contract which said plaintiff had, before that time, entered into with other parties to supply the said military post 9 with beef until the first of September, 1864, the terms of which said contract was, at the time first above stated, talked over and understood between the plaintiff and defendant. The plaintiff, on his part, agreed to pay defendant for said cattle the sum of 6½ cents per lb. nett on their delivery at Fort Union, and that it was further agreed between the plaintiff and defendant that 100 head of said cattle were to be delivered on the 1st day of February, A. D. 1864, or sooner if plaintiff needed them, on plaintiff's giving defendant reasonable notice.

That the ballance were to be delivered in lots of fifty head, on plaintiff giving defendant 15 days' notice; that it was further agreed between said parties that if they could not agree on the weights of said cattle at the time of delivery the neet weight thereof should be determined by the weight allowed by the officer of the Government at said post after said cattle had been slaughtered. That, in pursuance to a notice given by T. B. Slemmons, the agent of the plaintiff, to the de- 10 fendant, the defendant did deliver 80 head of cattle to said agent at Fort Union, on said contract, on the 13 day of February, A. D. 1864, and that plaintiff, by his said agent, paid the defendant

$1,500.00 in cash, and gave a promisory note for $\$972\frac{60}{100}$, payable in one day after the date thereof, for the ballance. That said note was shortly thereafter paid by said plaintiff's agent, to the satisfaction of said defendant.

That on the 8th day of April, A. D. 1864, the defendant refused to deliver any more cattle to plaintiff, and that there never was any other delivery of cattle by the defendant on said contract than the 80 head, as above stated. That by reason of the failure of said defendant to deliver to the plaintiff cattle in accordance with the terms of said contract, the said plaintiff was compelled, in order to comply with his engagements to deliver beef at said post at Fort Union, to purchase between the 13th day of February, A. D. 1864, and the first day of September following, of other parties, cattle, amounting in weight to 122,278 lbs.,
for which he paid $\$15,848\frac{72}{100}$, and that between the 13th day
11 of February, A. D. 1864, and the 1st of September following cattle advanced in price at Fort Union from 6½ to 20 cents per lb.
neet. and that the average value of beef at that place between said periods was 12½ cents per lb. neet. For these reasons the court hath thus found.

Wherefore it is ordered and adjudged by the court that the said plaintiff, Andrew Stewart, have and recover of and from the said defendant, Lucien B. Maxwell, the sum of seven thousand dollars, ($7,000,) together with the costs herein taxed of fifty dollars and twenty-five cents. And it is further ordered and adjudged that the property of the said defendant heretofore attached in this action be sold by the sheriff of the county to satisfy the said judgment herein, or so much thereof as may be necessary to satisfy the same. But should the said sail' of the said property fail to satisfy said judgment, execusion shall issue here unto said sheriff to satisfy, of the goods, chattels, lands, and tenements of the said defendant, any ballance remaining after the sail' of said property attached in this action.

12 Nov. 25. And now comes the plaintiff, by J. C. Henningray, esq., his attorney; also comes defendant, by John Martin, esq., and Isaac Sharp, esq., his attorney', and defendants files his motion for a new trial herein, and this cause coming on for hearing, being argued by counsel and considered by the court, was overruled.

And now comes the said plaintiff, and moves the court for a rule in said action, upon the securities of the said defendant herein in his delivery bond, filed in this action, to show cause why they should not return, or cause to be returned, to the sheriff of said county the property herein attached, to satisfy the judgment of the plaintiff herein, or pay to the said plaintiff herein the sum of money adjudged against the said defendant herein, returnable on the first day of the next term of said court, whether regular or special, hereafter occurring in said county.

J. C. HENNINGRAY,
Att'y for Plaintiff.

Which rule was granted by the court.

13 Rule on sureties on redelivery bond granted, returnable on the 1st day of the next term of this court.

Dec. 18.—Rule on sureties issued.

Dec. 18.—Returned endorsed: Received this writ Dec'r 18th, 1865, at one o'clock p. m., and served on C. H. Struby and A. D. Wheeler on the

20th of December, by delivering to each of them a true copy of the original summons. C. Rath not found in the county.

JOSEPH DUNLOP, *Sheriff*,
By W'M. LANE, *Dep'ty*.

STATE OF KANSAS:
Fifth Judicial District, County of Morris:

I, J. Hammond, clerk of the district court in and for said district, county, and State, do hereby certify that the foregoing transcript is a true and faithful copy of the record of the proceedings had in said court in the said cause in said transcript mentioned, now in my office in the town of Council Grove, county of Morris aforesaid.

14 In testimony whereof I have hereunto set my hand and affixed the seal of said court this 21st day of August, A. D. 1866.

[SEAL.] J. HAMMOND,
Clerk District Court.

STATE OF KANSAS,
Fifth Judicial District:

I, J. H. Watson, sole judge of the fifth judicial district in and for the State of Kansas, do hereby certify that the county of Morris, in said State, is one of the counties composing said judicial district; that J. Hammond is clerk of the district court in and for said county, and was at the making of the foregoing certificate by him signed, and that the signature of the said clerk thereto attached is genuine. And I do further certify that the foregoing attestation so by said clerk made to the said foregoing transcript is in due form of law.

Given under my official hand this 14th day of September, A. D. 1866.

J. H. WATSON.

Which said transcript is endorsed:

Filed in my office this the 19th day of March, A. D. 1870.

W'M BREEDEN,
Clerk.

15 And afterwards, to wit, on the same day, the following summons was issued by the clerk of said court, in the words and figures following, to wit:

The Territory of New Mexico to the sheriff of the county of Colfax, greeting:

You are hereby commanded to summon Lucien B. Maxwell to be and appear before the district court for the first judicial district of the Territory of New Mexico, on the first day of the next term thereof, to be begun and held within and for the county of Colfax, at the court-house of said county, on the Friday after the fourth Monday of March, A. D., 1870, then and there to answer unto Andrew Stewart, in a plea of debt, to the damage of the said plaintiff seven thousand and fifty $\frac{25}{100}$ dollars, together with interest and costs of suit. And have you then and there this writ.

16 Witness the Hon. Joseph G. Palen, chief justice of the supreme court of said Territory, and judge of the first judicial district court thereof, and the seal of said court, at Las Vegas, N. M., this 19th day of March, A. D. 1870.

[SEAL.] W'M BREEDEN, *Clerk.*

Which said writ is endorsed as follows, to wit:

This is an action of debt brought by plaintiff against defendant, on a judgment obtained in the district court for the county of Morris, State of Kansas, by plaintiff against defendant; amount of said judgment, seven thousand dollars, and costs, fifty $\frac{25}{100}$ dollars; amount claimed, seven thousand and fifty $\frac{25}{100}$ dollars; and three thousand dollars and costs of suit.

W'M BREEDEN, *Clerk.*

Upon which summons is the following return, to wit:

The within served March (23) twenty-third, by delivering copy & reading original to L. B. Maxwell.

A. J. CALHOUN,
Sheriff.

17 And afterwards, to wit, on the 1st day of April, A. D. 1870, being the first day of the April, A. D. 1870, term of said district court, within and for the county of Colfax, the following proceedings among others were had in said court, to wit:

Andrew Stewart
vs. } 43. Debt on judgment.
Lucien B. Maxwell.

And now comes the said defendant, by Mr. Holly, his attorney, and enters his appearance in this suit.

And afterwards, to wit, on the 4th day of April, A. D. 1870, being the third day of said term of said court, the following among other proceedings were had, to wit:

Andrew Stewart
vs. } 43. Debt.
Lucien B. Maxwell.

The said defendant, by his counsel, now files his demurrer to the plaintiff's petition herein, in the words and figures following, to wit:

18 Andrew Stewart
vs. } Debt on judgment.
Lucien B. Maxwell.

And now comes the said defendant, by his attorn*ies*, and, for plea to said petition, says that the said petition, and the matters and things therein contained, are not sufficient in law to authorize*d* the plaintiff to have and maintain his said suit against said defendant, and for cause of special demurrer said defendant assigns the following:

1st. A copy of the records & proceedings is produced, filed, and made a part of the petition, and it appears that record is not full and complete, in this, to wit:

It appears that a petition and precipe were filed in said cause and are not set forth in the transcript.

2nd. A summons appears to have been issued, but is not set forth in the transcript.

3rd. It appears that affidavit and bond in attachment was filed, and neither are set forth in the transcript.

19 4. It appears that affidavit for publication was filed, a demurrer filed, and an answer filed, and none of said papers are copied in the transcript.

5th. It appears by the transcript that a motion for a new trial was made and overruled, and the same are not entered in the transcript.

6. It appears by the record that the case was tried by the court without any assent upon the part of the defendant, and the evidence adduced is not given, but the opinion and conclusion of the court as to the facts proved is erroneously made a part of the record of the case.

7. It is shown by *by* the record that property of the value of $6,825.00 was attached and in the custody of the law, and until that property is legally accounted for, said levy and attachment constitutes a satisfaction in full of said judgment.

8th. Said transcript does not purport to be a full transcript of proceedings and record, but only a transcript of the record of the proceedings, which upon its face is defective and incomplete; and so the said 20 defendant asks the judgment of the court if said defendant ought to be required to make any further answer to said petition.

WHEATON, HOLLY & WATTS,
For Def't.

And the plaintiff saith that the said petition, and the matters therein contained, in manner and form as the same are above stated and set forth are sufficient in law for him to have and maintain his aforesaid action thereof against the said defendant; and the said plaintiff is ready to verify and prove the same as the court shall direct; wherefore, inasmuch as said defendant has not answered said petition, nor in any manner denied the same, plaintiff prays judgment, etc.

S. B. ELKINS,
For Plaintiff.

Upon which said demurrer is the following endorsement, to wit:

Filed in open court this 4th day of April, 1870.
W'M BREEDEN, *Clerk.*

21 Joinder in demurrer, filed April 4th, 1870.
W'M BREEDEN, *Clerk.*

Which demurrer is set down for argument to-morrow morning.

And afterwards, to wit, on the fourth day of said term of said court, the following proceedings, amongst others, were had in said court, to wit:

ANDREW STEWART
vs. } 43. Debt.
LUCIEN B. MAXWELL.

This day came on to be heard the demurrer of the said defendant to the plaintiff's petition herein, and the same being now argued by counsel, and the court not being sufficiently advised in the premises, takes said demurrer under advisement.

And afterwards, to wit, on the fifth day of said term of said court, the following, among other proceedings, were had, to wit:

22 ANDREW STEWART
vs. 43. Debt.
LUCIEN B. MAXWELL.

The demurrer of the said defendant to the plaintiff's petition herein having been argued and submitted on a former day of this term, and the same having then been taken under advisement by the court, and the court now being sufficiently advised in the premises, overrules said demurrer at defendant's costs, and the said defendant is ruled to plead herein to-morrow morning.

And afterwards, to wit, on the 6th day of April, A. D. 1870, the following bill of exceptions was filed, in the words and figures following, to wit:

ANDREW STEWART
vs. Debt on judgment.
LUCIEN B. MAXWELL.

Be it remembered that upon the calling of this cause the said defendant filed his demurer to the the petition herein, and the pl'ff his
23 joinder in demurrer, which said petition and the record made a part thereof is in the words and figures following, to wit, (see pages ;) and which demurrer is in the words and figures following, to wit, (see pages 18 & 20;) and thereupon the said plaintiff filed his joinder in demurrer in the words and figures following, to wit, (see page 20;) and the said demurrer being argued by counsel and submitted to the court, and the court being sufficiently advised in the premises, now overrules said demurrer, to which opinion of the court the defendant excepts, and asks that this his bill of exceptions may be signed and sealed by the court, and made a part of the record; which is done accordingly.

J. G. PALEN, *C. J., &c.* [L. S.]

Which said bill of exceptions is endorsed as follows, to wit:

Filed in open court this 6th day of April, 1870.
W'M BREEDEN, *Clerk.*

24 And afterwards, to wit, on the same day, the following affidavits were filed in said court, in the words and figures following, to wit:

ANDREW STEWART
vs. Debt on judg't.
LUCIEN B. MAXWELL.

Lucien B. Maxwell, upon his oath, now states that he is not now ready for the trial of the above-entitled cause of Andrew Stewart against him, now pending in the United States district court for the 1st judicial district in Colfax County, at the April term of said court, 1870. Said affiant further states that said suit was not instituted against him until on the 19th day of March, 1870, and is based upon a judgment supposed to have been rendered against him in a proceeding of attachment on the 24th day of November, 1865, for the sum of $7,050.25. Said affiant further states that he was not at the date of said judgment,

nor at any other time, legally indebted to the said Andrew Stewart one dollar. Your affiant further states that he had some verbal con-
25 versation with the said Stewart, in which he promised to furnish him cattle at Fort Union at six and a half cents per pound, cash on delivery; and in compliance with said verbal conversation he did deliver at Fort Union cattle on two occasions, but on the first delivery he was not paid cash on delivery, but was so paid for the second delivery.

Said affiant further states that said contract was not reduced to writing, nor was any money paid or advanced him on said contract, nor was it witnessed by any one, nor was it at all binding on him for the delivery of any cattle in any greater number, nor for any longer time, than suited the convenience or wish of said affiant.

Said affiant further states that a judgment against him upon such state of facts would be inequitable, unjust, illegal, fraudulent, and void, as he is informed and believes, and could only constitute a prima-*facia* claim, if any, against him, subject to his right to attack said judgment for want of jurisdiction in the court, for fraud, and for being
26 utterly destitute of merit or legal ability. Said affiant further states that, in order to make said defense, he is informed and believes that it is important and material for him to the record of the proceedings in said cause carefully examined, and a full and complete transcript of said cause, proceedings, and entries on the record obtained, in order that his attorneys may prepare his defense to said suit, and since the institution of this suit he has not had time to procure such record, as Council Grove, Kansas, is some six hundred miles distant from his residence in Colfax County. Said affiant further states that he is informed by his counsel that it is material and important for them in the proper defense of this case to consult and examine the statutes of the State of Kansas in force at the date of said suit, in order to ascertain the jurisdiction of said court and the legality of said proceedings in attachment, in order to determine whether said judg-
27 ment is conclusive against him, or only prima-*facia* conclusive, or absolutely void.

And until a copy of said statutes of the State of Kansas can be obtained by them and examine', the proper defense of said suit cannot now be prepared by them.

Said affiant further states that a perfect copy of said cause and proceedings, and a copy of the laws of Kansas can be procured by him by the next term of this court, if a continuance is granted him, and that this application is not made for delay, but in order that he may have all the facts before the court with a view to a fair and impartial trial of said cause; and further saith not.

L. B. MAXWELL.

Subscribed and sworn to before me this 5th day of April, A. D. 1870.
W'M BREEDEN, *Clerk.*

(Endorsed:) Filed in open court this 6th day of April, 1870.
W'M BREEDEN, *Clerk.*

28 ANDREW STEWART
vs.
LUCIEN B. MAXWELL. } Debt on judgment.

And now John S. Watts and Theodore D. Wheaton, attorn*ies* for L. B. Maxwell, upon their oath state that they have been engaged as attornies to defend the cause of Andrew Stewart against the said Maxwell at this term of court, said cause being entitled an action of debt on a judgment alleged to have been rendered in the courts of the State of Kansas in November, 1865, as appears by what purports to be a transcript from the records of said court. Said attornies state that from the facts stated to them, which the' believe to be true, it will become their duty to attack said judgment as void for want of legal notice, for want of any legal or valid cause of action, and for fraud; and on a fair trial of said cause they are informed and believe that said cause of action will be found utterly destitute of any legal merit.

29 Said attornies would further state that from an examination of said record, relied upon as evidence in this case, and filed with the papers in this case, it will appear that said transcript is not a full and complete transcript of the entire cause, but only a transcript of the docket entries made in said cause.

Said attornies further state that on examination of the laws of the State of Kansas upon the subject of attachments, *and* notice to non-resident defendants is material and important to them in order to show the court what legal effect said judgment is entitled to under said laws, and said attornies have not been able to obtain a copy of said laws during the short time which has elapsed since the commencement of this suit and the present term of this court, and without said copy of said laws they cannot do justice to the pleadings in this case necessary to bring the defense of said defendant before the court, and a full and complete record of the entire case and proceedings in the court 30 of the State of Kansas is necessary and important in order to enable said attornies to plead herein, and said copy of said laws and of said record can be obtained by the next term of this court. Said affiants further state that they are informed and believe that the said Maxwell has a just and meritorious defense to said suit, and that this application made for time to plead herein is made in good faith and for the purpose of enabling them to protect in a legal manner the rights of their clients in this case, and not for the purposes of delay or vexation in this suit; and further saith not.

TH'D' D. WHEATON.
JOHN S. WATTS.

Subscribed and sworn to before me this 6th day of April, 1870.
W'M BREEDEN, *Clerk.*

(Endorsed:) Filed in open court this 6th day of April, 1870.
W'M BREEDEN, *Cle'k.*

31 And afterwards, to wit, on the same day, being the fifth day of said term of said court, the following among other proceedings were had, to wit:

ANDREW STEWART
vs.
LUCIEN B. MAXWELL. } 43. Debt.

On motion of said defendant, by his counsel, on affidavits filed, it is considered by the court that this cause stand continued until the next term of this court, and the said defendant is ruled to plead herein in forty days from this date.

And afterwards, to wit, on the 30th day of May, 1870, the following pleas were filed in the office of the clerk of said court, in the words and figures following, to wit:

Andrew Stewart
vs.
Lucien B. Maxwell. } 43. Debt on judgment.

32 And now comes the said Lucien B. Maxwell, by Mess. Wheaton & Watts, his attorneys, and for plea to said petition says he does not owe nor is he indebted to said plaintiff in manner and form as is in said petition charged against him; and of this he puts himself upon the country.

WHEATON & WATTS,
For Def't.

And for second and further plea herein, said defendants says that there is no such record of judgment and recovery unpaid and unsatisfied against him and in favor of the said plaintiff as is set forth and mentioned in the petition of said plaintiff; and this he is ready to verify, &c.,

WHEATON & WATTS,
For Defendant.

And for further and third plea herein, said defendant says actio non, because he says that said supposed judgment is void and of no effect for want of jurisdiction in said court to hear, determine, and render judgment in said cause, as appears upon the face of said judgment and proceedings as the same are herein set forth; and this he is ready to verify.

33 WHEATON & WATTS,
For Defendant.

And for a further and fourth plea herein, said defendant says actio non, because he says that said supposed judgment in said petition mentioned has been fully paid and satisfied by attachment of the property of said defendant to the amount of $6,825.00 in value, and no execution ever having issued on said judgment, said judgment is fully paid and satisfied, and no longer evidence of any debt due from said defendant to said plaintiff; and this he is ready to verify.

WHEATON & WATTS,
For Defendant.

And for further and fifth plea herein, the said defendant says actio non, because he says it does not appear by the said judgment that any case of action was on file, or any affidavit or bond in attachment made and executed, and so said defendant says that said judgment is void for the want of jurisdiction in said court to render said judgment under the laws of the State of Kansas, in which said State said 34 judgment is said to have been rendered; and this the said defendant is ready to verify.

WH'ATON & WATTS,
For Defendant.

And for a further and sixth plea herein, the said defendant says actio non, because he says that said judgment was obtained by the said plaintiff by a false and fraudulent statement of a contract, when no legal or binding contract in fact existed, and by procuring false and fraudulent evidence of witnesses interested in the subject-matter of said suit to support said false and fraudulent statement of said supposed contract, and so said defendant avers that by reason *as* the false and fraudulent procurement by said plaintiff of said supposed judgment the same is void in law; and this he is ready to verify.

WHEATON & WATTS,
For Defendant.

35 And for a further and seventh plea herein, said defendant says actio non, because he says that since the rendition of said supposed judgment no execution has ever been issued on said judgment, and under and by virtue of the laws of the State of Kansas said judgment is presumed to have been fully paid and satisfied unless said judgment had been reversed by process of scire facias against said defendant within two years after the rendition of judgment, and said defendant avers that no such process for the revival of said judgment has ever been issued on said judgment; and this he is ready to verify.

WHEATON & WATTS & HOLLY,
For Defe'ts.

And for a further and eighth plea herein, said defendant says actio non, because he says that no attachment bond and affidavit as required by the laws of Kansas, with security in double value of the property attached, approved of by the clerk, for the payment by the plaint- 36 iff of the damages which might be sustained by reason of the wrongful issuing of said attachment, and so said defendant avers that judgment is void for want of jurisdiction in the court to render said judgment; and this he is ready to verify.

WATTS & WHEATON,
For Def't.

And for further and ninth plea herein, said defendant says actio non, because he says that said cause of action was based upon a claim of damages for the violation of a supposed verbal contract between the plaintiff and defendant, and the damages were unliquidated and unknown, and no jury was called to assess the same, and the said court unlawfully and wro'gfully rendered a judgment without a verdict of a jury upon which to base said judgment, and so said defendant says said judgment is fraudulent and void, and forms no valid claim against said defendant; and this he is ready to verify.

WATTS & WHEATON,
For Def't.

37 (Endorsed:) Filed in my office this 30th day of May, 1870. W'm Breeden, clerk.

And afterwards, to wit, on the 29th day of August, A. D. 1870, being the third day of the August, A. D. 1870, term of said court, the following among other proceedings were had, to wit:

ANDREW STEWART
vs. } 43. Debt.
LUCIEN B. MAXWELL.

And now comes the said plaintiff, by his attorney, and files his demurrer to the first, third, fourth, fifth, sixth, seventh, eighth, and ninth pleas of the said defendant herein, which said demurrer is in the words and figures following, to wit:

In the district court, first judicial district, county of Colfax, August term, A. D. 1870.

ANDREW STEWART
vs.
L. B. MAXWELL.

38 And the said plaintiff as to the said pleas of the said defendant by him firstly, thirdly, fourthly, fifthly, sixthly, seventhly, eightly, and ninethly above pleaded, saith that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude him, the said plaintiff, from having and maintaining his aforesaid action thereof against the said defendant, and that he, the said plaintiff, is not bound by law to answer the same, and this the said plaintiff is ready to verify; wherefore by reason of the insufficiency of the said plea in this behalf the said plaintiff prays judgment, and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to him.

S. B. ELKINS,
Att'y for Pl'ff.

(Endorsed:) Filed in open court this 29th day of August, 1870. W'm Breeden, clerk.

39 And the same being argued by counsel, and the court being sufficiently advised in the premises, sustains said demurrer as to the first, fifth, sixth, seventh, eighth, and ninth pleas of the said defendant herein, and overrules said demurrer as to the said second, third, and fourth pleas, with leave to said defendant to amend the same.

And afterwards, to wit, on the same day, the following plea was filed in said court, to wit:

ANDREW STEWART
vs. N. 2. Debt.
LUCIEN B. MAXWELL.

And the said defendant, by Wheaton & Watts, his attornies, comes and defends the wrong and injury when, &c., and says that there is not any record of said supposed judgment in the said declaration mentioned remaining in the said district court of Morris County, in the State of Kansas, in manner and form as the said plaintiff hath above in his
40 said declaration alleged, and this the said defendant is ready to
verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant, &c.

WHEATON & WATTS,
For Def't.

3 Chitty, 994.

(Endorsed:) Filed in open court this 29th day of August, 1870. W'm Breeden, clerk.

And also the following amended pleas, to wit:

And for second and further plea herein, said defendant says that there is no such record of judgment and recovery unpaid and unsatisfied against him and in favor of the said plaintiff as is set forth and mentioned in the petition of said plaintiff; and this he is ready to verify, &c., by the record.

WHEATON & WATTS,
For Defendant.

41 And for further and third plea herein, said defendant says actio non, because he says that said supposed judgment is void and of no effect for want of jurisdiction in said court to hear, determine, and render judgment in said cause, as appears upon the face of said judgment and proceedings as the same are herein set forth; and this he is ready to verify by the record.

WHEATON & WATTS,
For Defendant.

And for a further and fourth plea herein, said defendant says actio non, because he says that said supposed judgment in said petition mentioned has been fully paid and satisfied by attachment of the property of said defendant to the amount of $6,825.00 in value; and this he is ready to verify.

WHEATON & WATTS,
For Defendant.

(Endorsed:) Amended pleas filed in open court this 29th day of August, 1870. W'm Breeden, clerk.

42 And afterwards, to wit, on the 30th day of August, A. D. 1870, being the fourth day of said term of said court, the following replications were filed, to wit:

ANDREW STEWART
vs. } Debt.
LUCIEN B. MAXWELL.

And the said plaintiff, as to the said plea of the said defendant by him secondly above pleaded, says precludi non, because he says that there is such a record of the said judgment remaining in the said district court for Morris County, in the State of Kansas, in manner and form as he, the said plaintiff, hath above in his said petition in that behalf alleged, and this the said plaintiff is ready to verify by the said record here shown to the court, &c.

And the said plaintiff, as to the said plea of the said defendant by him thirdly above pleaded, says precludi non, because he says 43 that said judgment is not void and of no effect for want of jurisdiction in said court to hear, determine, and render judgment in said cause; and this the said plaintiff is ready to verify.

And the said plaintiff, as to the said plea by the said defendant fourthly above pleaded, says precludi non, because he says that said judgment in said petition mentioned has not been fully paid and satisfied by attachment as in said plea alleged, and this the said plaintiff prays may be inquired of by the country, &c.

S. B. ELKINS,
For Plaintiff.

(Endorsed:) Filed in open court this 30th day of August, 1870. W'm Breeden, clerk.

And afterwards, to wit, on the same day, being the fourth day of said term of said court, the following proceedings, amongst others,
44 were had, to wit:

ANDREW STEWART
vs. } 43. Debt.
LUCIEN B. MAXWELL.

And now comes the said defendant, by his counsel, and moves the court to grant him a change of venue herein, for reasons stated in affidavits filed; which said affidavits are in the words and figures following, to wit:

ANDREW STEWART
vs. } Debt.
LUCIEN B. MAXWELL.

And the said defendant, Lucien B. Maxwell, upon oath, states that he cannot have justice done him in the county of Colfax, where this suit is now pending, and for cause of such obstruction of justice alleges the following, to wit: That much the largest number of persons qualified and usually acting as jurors in said county are miners, and for
45 many causes, and principally on account of conflicting interests in relation to the lands on which their mines are located, have become so strongly prejudiced against this affiant and his interests that a fair jury cannot be had to try his said cause therein.

L. B. MAXWELL.

Sworn to and subscribed before me this 29th day of August, A. D. 1870.

JESUS G. ABREÜ,
Justice of the Peace.

And now comes Henry N. Hooper and John Holland, witnesses, who, being duly sworn upon oath, state that they are in nowise interested in the above-named cause or its event, and that the matters and things set forth and contained in the foregoing affidavit are true.

HENRY N. HOOPER.
JOHN HOLLAND.

Sworn to and subscribed before me this 29th day of August, A. D. 1870.

JESUS G. ABREÜ,
Justice of the Peace.

46 The defendant moves the court for a change of venue in this cause, for the reasons set forth in the foregoing affidavit.

WATTS & WHEATON,
For Defendant.

(Endorsed:) Filed in open court this 30 day of August, 1870.
W'M BREEDEN, *Clerk.*

And it appearing to the satisfaction of the court from such affidavits that a fair and impartial trial of this cause cannot be had in this county, it is therefore considered by the court, the counsel of the respective parties consenting thereto, that the venue in this cause be changed to the county of Santa Fé, upon the payment by the defendant of the costs of such change and of the term, and that the clerk of this court transmit to the clerk of the district court of the county of Santa Fé a full and perfect transcript of all the journal entries of proceedings, together with all the original papers in this cause.

47 And afterwards, to wit, on the 25th day of February, A. D. 1871, being the sixth day of the February, A. D. 1871, term of the district court for the first judicial district of the Territory of New Mexico, within and for the county of Santa Fé, the following among other proceedings were had in said court, to wit:

ANDREW STEWART
vs. } 411. Debt on judgment.
LUCIEN B. MAXWELL.

This day came the said parties, by their counsel, and issue being joined between the parties herein, thereupon came a jury, to wit, Felipe Ortiz, Jacinto Guégo, Marcial Sena, José de la luz Romero, Cande lario Garduña, Pedro Salas, Miguel Roybal, Elijao Boca, Jesus Boca, Antonio Annijo y Ortiz, Cresantos Romero, and Martin Roybal, twelve good and lawful men, duly elected, tried, and sworn the truth to speak upon the issue*d* joined between the parties, upon their oaths, do say that
48 they find for the plaintiff the debt demanded; that there is a record of the judgment upon which the plaintiff's action is founded in manner and form alleged in the plaintiff's petition herein; that the court in which said judgment was rendered had jurisdiction to render said judgment, and that said judgment has not in any manner been paid or satisfied; and they assess the damages of said plaintiff, by reason of the detention of said debt, to nine thousand five hundred and seventy-two & $\frac{50}{100}$ dollars. It is therefore considered by the court that the said plaintiff, Andrew Stewart, recover of the said defendant, Lucien B. Maxwell, his debt aforesaid, and also the said sum of nine thousand five hundred and seventy-two & $\frac{50}{100}$ dollars, his damages aforesaid, as also his costs in this behalf expended, to be taxed, and that execution issue therefor.

49 And be it remembered that, upon the trial of said cause, the court gave to the jury the following instructions for the plaintiff, to wit:

ANDREW STEWART
vs. } Debt on judgment.
LUCIEN B. MAXWELL.

In this case the court instructs the jury that the record of judgment introduced in this cause is proper evidence, and they are authorized from said evidence to find for the plaintiff, and assess his damages at the amount of said judgment and the interest thereon, since the rendition of the same, amounting to $\$9,572\frac{50}{100}$, (nine thousand five hundred and seventy-two $\frac{50}{100}$ dollars.)

(Endorsed:) Filed in open court this 25th day of February, 1871.

W'M BREEDEN, *Clerk.*

And be it further remembered, that the following instructions asked for by the defendant were disallowed by the court, to wit:

50 Andrew Stewart
vs.
Lucien B. Maxwell. } Debt on judgment.

The defendant moves the court to instruct the jury: That the paper offered in evidence by the plaintiff, and purporting to be the record of a judgment of the district court of the county of Morris, in the State of Kansas, should not be considered by them as evidence in this cause, for the reason that the said judgment is void for want of jurisdiction in said Kansas district court to try the same without the intervention of a jury, no waiver of the right of trial by jury appearing upon the record of said cause as required by the laws of Kansas.

2nd. That the record produced by plaintiff as above stated shows a levy in this cause upon the property of the defendant amounting to six thousand eight hundred and twenty-five dollars, and that this levy and the proceedings thereon, as shown by said record, are prima 51 *facia* of payment of so much money on said judgment, and should be so allowed by the jury.

WHEATON,
For Defendant.

(Endorsed:) Filed in my office this 25th day of February, 1870.
W'M BREEDEN, *Clerk.*

And afterwards, to wit, on the 27th day of February, A. D. 1871, being the 7th day of said term of said court, the following among other proceedings were had, to wit:

Andrew Stewart
vs.
Lucian B. Maxwell. } 411. Debt.

And now comes the said defendant, by his attorney, and moves the court to grant him a new trial herein, for reasons stated in said motion, which said motion is in the words and figures following, to wit:

Andrew Stewart
vs.
Lucien B. Maxwell. } Debt on judgment.

52 The defendant, by his attorney, moves the court to set aside the verdict of the jury and grant a new trial in this cause for the reasons following, to wit: The jury found against the law and evidence.

2nd. The court admitted illegal evidence and instructions to go to the jury.

3rd. The court refused to give instructions to the jury on the part of the defendant that should have been given.

4th. Because the verdict was not responsive to the action.

5th. For various other good and sufficient reasons.

WHEATON,
For Def't.

Which motion is overruled by the court.

And afterwards, to wit, on the same day, the following among other proceedings were had in said court, to wit:

ANDREW STEWART
vs. } 411. Debt.
LUCIEN B. MAXWELL.

53 And now comes the said defendant, by his attorney, and moves the court to arrest the judgment herein, for reasons stated in said motion, which said motion is in the words and figures following, to wit:

ANDREW STEWART
vs. } Debt on judgment.
LUCIEN B. MAXWELL.

The defendant moves the court to arrest the judgment in this cause, for the reasons following, to wit:

1st. The court overruled the demurrer filed by plaintiff.

2nd. The court sustained the demurrer to plaintiff's pleas No. 1, 5, 6, 7, 8, & 9.

3rd. The court overruled defendant's motion for a new trial; and

4th. For various other errors apparent on the face of the record.

WHEATON,
For Def'ts.

And the court being sufficiently advised in the premises, overruled said *said* motion.

54 And be it remembered that upon the day on which said cause was tried, to wit, the 25th day of Febr[illegible], A. D. 1871, the following bills of exception were filed, to wit:

ANDREW STEWART
vs. } Debt on judgment.
LUCIEN MAXWELL.

Be it remembered that, upon the trial of this cause, plaintiff offered as evidence what purported to be the record of the proceedings and judgment of the district court of the county of Morris, in the State of Kansas, upon which this suit is founded, (see pages 5 to 15,) which was there objected to by the defendant, upon the following grounds, to wit:

1st. That the same is not the record of the State of Kansas district court, but a mere schedule by the clerk of the proceedings had therein.

2nd. The same was not signed by the judge, as required by the laws of Kansas.

3rd. That the certificate of the judge does not show that he was presiding judge of any court.

55 4th. That the cause was tried by the court without the intervention of a jury, without a waiver of the right of trial by jury, as required by the laws of the State of Kansas, and for other reasons; which objections were there overruled by the court. To the opinion of the court in overruling said objections, and allowing said copy of what purported to be the record to go to the jury as evidence, the defendant, by his counsel, excepts, and prays that this his bill of exceptions be signed, sealed, and made a part of the record; which is done accordingly.

J. G. PALEN, *C. J., &c.* [SEAL.]

(Endorsed:] Filed in my office this 25th day of February, 1871. W'm Breeden, clerk.

ANDREW STEWART
vs. } Debt on judgment.
LUCIEN B. MAXWELL.

Be it remembered that, after the trial and verdict in this cause, 56 the defendant moved the court for a new trial in said cause, (see page 52,) and also for an arrest of the judgment herein; which motions were here overruled by the court. To the opinion of the court in overruling said motions defendant, by his counsel, excepts, and prays that his bill of exceptions be signed, sealed, and made a part of the record; which is accordingly .

WHEATON, *for Def't.*
J. G. PALEN, *C. J., &c.* [L. S.]

(Endorsed:) Filed in my office this 25th day of February, 1871. W'm Breeden, clerk.

ANDREW STEWART
vs. } Debt on judgment.
LUCIEN B. MAXWELL.

Be it remembered that, on the trial of this cause, the plaintiff offered in evidence what purported to be a certified copy of the record of the proceedings and judgment of the district court of the county of Morris, in the State of Kansas, in the words and figures following, to wit, (see pages 5 to 15,) which, after having been objected to by the de- 57 fendant, was by the court allowed to go to the jury as evidence. Also the plaintiff introduced Thomas B. Catron as a witness for him in said cause, who, upon oath, stated that he had computed the interest of said judgment, according to the laws of Kansas, at seven per cent., and that the same amounted to the sum of two thousand five hundred and twenty-two dollars and twenty-five cents. And this was all the testimony offered or given in the cause. Upon which the court instructed the jury as follows. (See page 50.) The defendant asked the court for the following instructions to the jury, to wit, (see page 31,) which were then rejected by the court. To the opinion of the court in giving the instructions so given as aforesaid, and rejecting the instructions so asked for by the defendant, the defendant, by his counsel, excepts, and prays that his bill of exceptions be signed, sealed, and made a part of the record; which is done accordingly.

J. G. PALEN, *C. J., &c.* [SEAL.]

58 (Endorsed:) Filed in my office this 25th day of February, 1871. W'm Breeden, clerk.

And afterwards, to wit, on the 27th day of February, A. D. 1871, being the 7th day of said term of said court, the following among other proceedings were had therein, to wit:

ANDREW STEWART
vs. } 411. Debt.
LUCIEN B. MAXWELL.

And now comes the said defendant, by his attorney, and moves the court to grant him an appeal herein from the judgment rendered in this cause at a former day of this term to the supreme court of the Territory of New Mexico, and files the necessary affidavit, as required by law, which said affidavit is in the words and figures following, to wit:

ANDREW STEWART
vs. } Debt on statute.
LUCIEN B. MAXWELL.

59 Affidavit of Theodore D. Wheaton, agent for Lucien B. Maxwell, states that an appeal in this cause to the supreme court of this Territory is not taken for the purpose of vexation and delay, but because this affiant that the appellant is aggrieved by the judgment of the court.

THEODORE D. WHEATON.

Subscribed and sworn to before me this 27th day of February, A. D. 1871.

W'M BREEDEN, *Clerk.*

(Endorsed:) Filed in my office this 27th day of February, 1871. W'm Breeden, clerk.

Which motion is sustained by the court, and an appeal granted, as prayed for. And now comes the defendant, by his attorney, and files his appeal-bond herein, which said appeal-bond is in the words and figures following, to wit:

60 We, the undersigned, Lucien B. Maxwell, by Theodore D. Wheaton, his agent, as principal, and D. Bernard Koch, for Johnson & Koch, and Charles Hopkins and Alexander Vallé, as his securities, are held and firmly bound unto Andrew Stewart in the sum of nineteen thousand two hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly, jointly, and severally by these presents, as witness our hands and seals this 27th day of February, A. D. 1871.

The condition of the above obligation is, nevertheless, such that whereas the above-named Lucien B. Maxwell has appealed from the judgment of the district court for the county of Santa Fé, in the Territory of New Mexico, in a certain action of debt, in which the said Andrew Stewart is plaintiff and the said Lucian B. Maxwell is defendant, said judgment being for the sum of nine thousand five hundred and twenty-two dollars and fifty cents, and costs of suit, amounting to the sum of thirty dollars.

61 Now, threfore, if the said Lucien B. Maxwell shall prosecute his said appeal with due diligence to a decision in the supreme court of said Territorry, and pay the judgment appealed from, should it be affirmed or the appeal be dismissed, and he will perform the judgment of the district court, and will also pay the costs and damages that may be adjudged against him on the appeal, then this obligation to be void; otherwise to be and remain in full force and effect in law.

THEODORE D. WHEATON, [SEAL.]
For L. B. Maxwell.
D. BERNARD KOCH, [SEAL.]
For Johnson & Koch.
CHARLES S. HOPKINS. [SEAL.]
his
ALEXANDER + VALLE. [SEAL.]
mark.

Taken and approved by me this 27th day of February, A. D. 1871.

W'M BREEDEN, *Clerk.*

(Endorsed:) Filed in my office this 27th day of February, 1871. W'm Breeden, clerk.

62 Which is approved, and it is therefore ordered that execution on the judgment rendered herein be stayed.

And be it remembered that, on the 1st day of January, A. D. 1872, the following assignment of errors was filed in the office of the clerk of said court, which said assignment of errors is in the words and figures following, to wit:

ANDREW STEWART
vs. } Appeal.
LUCIEN B. MAXWELL.

Assignment of errors.

The defendant for errors in the above cause assigns the following, to wit:

1st. The court erred in overruling the demurrer in this cause.
2nd. The court erred in sustaining demurrers to defendant's pleas.
3d. The court erred in granting instructions asked by plaintiff, and in refusing the instructions asked by defendant.
63 4th. The court erred in overruling motion for new trial.
5th. Court erred in overruling motion in arrest of judgment.
6th. Court erred in rendering judgment for plaintiff and against the defendant.

TH'O' D. WHEATON,
For Defendant.

Appellees say there is no error in the record.

S. B. ELKINS,
Att'y for Appellees.

(Endorsed:) Assignment of errors.

Filed in my office this 1st day of January, 1872.

W'M BREEDEN, *Clerk.*

And be it further remembered that, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, in said Territory, on the first Monday of January, A. D. 1872, being the 1st day of January, A. D. 1872, and on the 11th day of said term
64 of said court, the following among other proceedings were had in said court, to wit:

ANDREW STEWART, APPELLEE,
vs. } Appeal. Santa Fé Co., 1st district.
LUCIEN B. MAXWELL, APPELLANT.

This cause is set down for hearing on Monday morning next.

And afterwards, to wit, on the 13th day of said term of said court, the following among other proceedings were had, to wit:

ANDREW STEWART, APPELLEE,
vs.
LUCIEN B. MAXWELL, APPELLANT.
} Appeal. Santa Fé Co., 1st district.

This cause now came on to be heard, and was now argued by Mr. Wheaton for the appellant, and, there not being time to conclude the argument of this cause on this day, the same is continued and postponed until to-morrow.

65 And afterwards, to wit, on the 15th day of said term of said court, the following among other proceedings were had, to wit:

ANDREW STEWART, APPELLEE,
vs.
LUCIEN B. MAXWELL, APPELLANT.
}

This cause again came on to be heard, and was now argued by Mr. Elkins for the appellee and by Mr. Wheaton for appellant, and the argument of this cause being now concluded, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, on the 16th day of said term of said court, the following among other proceedings were had, to wit:

ANDREW STEWART, APPELLEE,
vs.
LUCIEN B. MAXWELL, APPELLANT.
} Appeal. Santa Fé Co., 1st district.

66 This cause having been argued by counsel and submitted to the court at a former day of this term, and the court having then taken the same under advisement, and being now sufficiently advised in the premises, now announces its opinion by Associate Justice H. S. Johnson, affirming the judgment of the court below.

It is therefore considered and adjudged by the court that the judgment of the court below in this cause be, and the same is hereby, in all respects affirmed, with interest thereon at the rate of six per cent. per annum since the rendition thereof, on the twenty-fifth day of February, A. D. one thousand eight hundred and seventy-one. And that the said appellee, Andrew Stewart, recover of the said appellant, Lucien B. Maxwell, the amount of said judgment and interest, amounting to the sum of ten thousand and eighty-seven dollars and eighty cents, together with his costs in this behalf expended, to be taxed, and that execution
67 issue therefor. And it appearing to the satisfaction of the court by the record herein that James L. Johnson, D. Bernard Koch, Charles S. Hopkins, and Alexander Vallé are securities on the appeal-bond of the said appellant herein, it is further considered and adjudged by the court that the said appellee have judgment against said securities for the amount of said judgment, interest, and costs; and that the said appellee, Andrew Stewart, recover of the said appellant, Lucien B. Maxwell, and James L. Johnson, D. Bernard Koch, Charles S. Hopkins, and Alexander Vallé, his securities, the said sum of ten thousand and eighty-seven dollars and eighty cents, and also his costs in this behalf expended, as well in the court below as in this court, to be taxed: and that the record of this cause be remitted to the district court for the county of Santa Fé, where this cause was tried and from whence it came
68 into this court, with directions to issue execution on this judgment.

Associate Justice H. S. Johnson has leave to file a written opinion herein in vacation, and Chief Justice Palen to file in writing his reasons for the judgment in the court below.

And afterwards, to wit, on the 20th day of said term of said court, the following among other proceedings were had, to wit:

ANDREW STEWART, APPELLEE,
vs.
LUCIEN B. MAXWELL, APPELLANT. } Appeal. Santa Fé Co., 1st district.

And now the said appellant, by his attorney, and in open court, here gives notice that he will apply for a writ of error in this cause to the Supreme Court of the United States.

And be it further remembered that heretofore, to wit, on the 29th day of January, A. D. 1872, the following appeal-bond was filed in the office
of the clerk of the supreme court of New Mexico, which said ap-
69 peal-bond is in the words and figures following, to wit:

In the supreme court of the Territory of New Mexico, for the district of New Mexico.

ANDREW STEWART, APPELLEE,
vs.
LUCIEN B. MAXWELL, APPELLANT.

Appeal from a judgment of the district court for Santa Fé County.

Know all men by these presents that we, Lucien B. Maxwell and James L. Johnson, as principals, and Jesus G. Abreü and Valentine S. Shelby, as their securities, are held and firmly bound unto Andrew Stewart in the sum of twenty-one thousand dollars, to be paid to the said Andrew Stewart, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally,
and our and each of our heirs, executors, and administrators,
70 firmly by these presents. Sealed with our seals and dated this
twenty-fourth day of January, A. D. one thousand eight hundred and seventy-two.

Whereas the above-named Lucien B. Maxwell and James L. Johnson, together with D. Bernard Koch, Charles S. Hopkins, and Alexander Vallé have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the Territory of New Mexico, on the 18th day of January, A. D. 1872, against said Lucien B. Maxwell and the said James L. Johnson, D. Bernard Koch, Charles S. Hopkins, and Alexander Vallé, as his securities on his appeal-bond:

Now, therefore, the condition of the foregoing obligation is such, that if the said Lucien B. Maxwell, James L. Johnson, D. Bernard Koch, Charles S. Hopkins, and Alexander Valle shall prosecute their said
writ of error to effect, and answer all damages and costs if they
71 shall fail to make good their plea, then this obligation shall be
void; otherwise the same shall remain in full force and virtue.

L. B. MAXWELL. [SEAL.]
J. L. JOHNSON. [SEAL.]
JESUS. G. ABREÜ. [SEAL.]
V. S. SHELBY. [SEAL.]

(Endorsed:) I am satisfied with the securities on the above bond, without justification.

S. B. ELKINS,
Att'y for A. Stewart.

The above bond taken and approved by me this 29th day of January A. D. 1872.

W'M BREEDEN, *Clerk.*

The said bond has the following acknowledgments upon it, to wit:

UNITED STATES OF AMERICA,
Territory of New Mexico:

72 This day personally appeared before me, the undersigned, clerk of the supreme court of the Territory of New Mexico, Lucien B. Maxwell, Jesus G. Abreü and Valentine S. Shelby, all to me well known, who signed and sealed the foregoing bond, and acknowledged that they executed the same of their own voluntary act and will for the purposes therein contained.

In testimony whereof I hereunto set my hand and affix the seal of said court this 24th day of January, A. D. 1872.

[SEAL.] W'M BREEDEN, *Clerk.*

UNITED STATES OF AMERICA,
Territory of New Mexico:

This day personally appeared before me, William Breeden, clerk of the supreme court of the Territory of New Mexico, James L. Johnson, to me well known, who signed and sealed the foregoing bond, and acknowledged that he executed the same of his own voluntary act and will for the purposes therein contained.

73 Witness my hand and the seal of said court this 29th day of February, A. D. 1872.

[SEAL.] W'M BREEDEN, *Clerk.*

And afterwards, to wit, on the 23d day of said term of said court, the following among others poceedings were had, to wit:

ANDREW STEWART, APPELLEE,
vs.
LUCIEN B. MAXWELL, APPELLANT.

The bond in error of said Lucien B. Maxwell having been approved and filed, it is ordered that execution on the judgment rendered herein by this court be stayed.

UNITED STATES OF AMERICA,
Territory of New Mexico:

74 I, William Breeden, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing seventy-three pages contain a full, true, and perfect copy of the transcript filed in said court, together with all of the journal entries of proceedings had in said court, and also all of the original papers filed in the above-entitled cause as remains of record in my office.

Witness my hand and the seal of said supreme court at Santa Fé, New Mexico, this 1st day of August, A. D. 1872.

[SEAL.] W'M BREEDEN,
Clerk Sup. C't of N. M.

75 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the honorable judges of the supreme court of the Territory of New Mexico, greeting:

Because in the record and proceedings, as also the rendition of a judgment in a plea, which is in the said supreme court before you, between Lucien B. Maxwell, James L. Johnson, D. Bernard Koch, Charles S. Hopkins, and Alexander Vallé, and Andrew Stewart, a manifest error hath happened, to the great damage of the said Lucien B. Maxwell, James L. Johnson, D. Bernard Koch, Charles S. Hopkins, and Alexander Vallé, as by their complaint appears; and we being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do hereby command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court
76 of the United States, together with this writ, so that you have the
same at Washington on the first Monday of December next, at the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court, this 24th day of January, A. D. one thousand eight hundred and seventy-two.

Issued at office in the city of Santa Fé, with the seal of the supreme court of the Territory of New Mexico, for the district of the Territory of New Mexico.

[SEAL.] W'M BREEDEN,
Clerk of the Supreme Court of the Territory of New Mexico.

Allowed by—

J. G. PALEN,
Chief Justice.
HEZEK. S. JOHNSON,
Associate Justice.

Associate Justice.

77 I certify that an authenticated transcript of the judgments, and all things concerning the same, together with the original files and pleadings within mentioned, are annexed and enclosed with this cer't, and herewith returned as within commanded, this 1st day of August, A. D. 1872.

W'M BREEDEN,
Clerk Sup. Court of N. M.

(Indorsed:) Andrew Stewart vs. Lucien B. Maxwell. Writ of error.

78 The United States of America to Andrew Stewart or Stephen B. Elkins, his attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first

Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein Lucien B. Maxwell, James L. Johnson, D. Bernard Koch, Charles S. Hopkins, and Alexander Vallé are plaintiffs in error, and Andrew Stewart is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

79 Witness the Hon. Joseph G. Palen, chief justice of the supreme court of the Territory of New Mexico, this 14th day of October, A. D. 1872.

J. G. PALEN,
Chief Justice Sup. C't New Mexico.

80 UNITED STATES OF AMERICA,
Territory of New Mexico:

This day personally appeared before, the undersigned, Marshal Breeden, of lawful age, who, being by me duly sworn, upon his oath says that on the 14th day of October, A. D. 1872, at the city of Santa Fé, in the county of Santa Fé, and Territory of New Mexico, he handed the foregoing citation to S. B. Elkins, esq'r, the attorney therein named, for perusal, and furnished him with a true copy thereof.

MARSHALL BREEDEN.

Subscribed and sworn to before me this 14th day of October, A. D. 1872.

J. G. PALEN. [L. S.]
Chief Justice of the Supreme Court of the Territory of New Mexico.

(Indorsed:) Andrew Stewart vs. L. B. Maxwell. Citation.

(Indorsement on cover:) No. 431. Lucien B. Maxwell, James L. Johnson, D. B. Koch, C. S. Hopkins, & Alex'r Vallé, plaintiffs in error, vs. Andrew Stewart. Terr'y New Mexico, sup. court. Filed 28 April, 1873.

O

Supreme Court of the United States.

LUCIAN B. MAXWELL, APPELLANT.

vs.

ANDREW STEWART, APPELLEE.

BRIEF OF APPELLEE.

STEPHEN B. ELKINS,
FRED. W. JONES,
For Appellee.

GEORGETOWN COURIER PRINT.

SUPREME COURT OF THE UNITED STATES.

LUCIEN B. MAXWELL, Appellant,
vs.
ANDREW STEWART, Appellee.
No. 150. October Term, 1874.

STATEMENT OF CASE.

The facts in the case, as appear from the record, are briefly, as follows :—

A suit was brought by Andrew Stewart, defendant in error, against the plaintiff in error, Lucien B. Maxwell, on the 13th day of September, A. D. 1863, in the District Court of the State of Kansas for the County of Morris; in which suit the proceeding was, first, by process of summons against the defendant, which process by the sheriff having been returned *non est*, the suit was further continued by an attachment of defendant's personal property, then being within the said county and the jurisdiction of the court The defendant appeared by attorney, filed firstly a demurrer, and afterwards an answer; and on the 24th of November, A. D 1864, the cause being heard upon the pleadings, testimony, (both oral and in depositions,) and argument of counsel, a judgment was rendered in favor of the plaintiff against the defendant for $7000 and costs Record, pp. 2, 3, and 4. The property attached had meanwhile been released from the attachment by the usual delivery bond, and restored to the custody of the defendant.

A motion for a new trial was made by defendant's counsel, which was overruled; and a rule being laid upon the sureties on the delivery bond, it was returned *non est* as to one, and, although the others were served, no response was ever made by either of them, nor any further proceeding taken against the sureties, because of their known insolvency. No appeal was prayed, nor any steps taken to reverse, annul, or vacate said judgment, nor does there seem to have been any farther proceeding in the cause in Morris County, or in the State of Kansas.

The case thus remained for nearly six years, or until the 19th day of March, 1870, when Andrew Stewart brought the present suit in the District Court of the Territory of New Mexico, declaring upon the judgment recovered as above stated, of which the record was duly authenticated, according to the requirement of the Act of Congress of May 24th, 1790. Record, pp. 1, 2, and 5.

Demurrer was filed by Maxwell, (the grounds of which, all taken together, were simply that the record was incomplete and imperfect,) which was overruled, and defendant required to plead over, to which action of the court an exception was taken. Record, pp. 6 to 8.

The defendant Maxwell then filed nine pleas, namely: 1st, *nil debet;* 2d, *nul tiel record;* 3d, to the jurisdiction of the Court in Kansas; 4th, payment; 5th, want of jurisdiction of the Kansas Court; 6th, that the judgment in Kansas had been procured by false and fraudulent evidence; 7th, that no execution had been issued thereon and satisfaction was conclusively presumed; 8th and 9th, want of jurisdiction of Kansas Court, giving reasons. Record, pp. 11 and 12.

The plaintiff demurred to all these pleas except the second, which demurrer was sustained as to all except the third and fourth, and defendant given leave to amend. Record, p 13

The defendant then filed pleas of 1, *nul tiel record;* 2, *nul tiel record* "of judgment unpaid;" 3d, to the jurisdiction of the Court in Kansas; 4th, payment; and upon these pleas, issues were joined. Record, pp. 13 and 14.

The venue was then changed, at the motion of the defendant, and the cause having been afterwards tried by the court and a jury, there was a special verdict, finding for the plaintiff on each of the issues severally, and judgment thereupon was rendered for the plaintiff. Record, pp. 15 and 16.

A motion for a new trial was overruled by the court, as was also a motion in arrest of judgment, and exceptions were taken to these rulings of the court, as also to the admission of the record of the judgment as evidence, and an appeal was taken and granted to the Supreme Court of the territory. Record, pp. 18, 19, and 20.

Upon full argument of the cause in the appellate tribunal, the judgment of the court below was affirmed, and judgment rendered againt Maxwell and his sureties, (under statute of New Mexico,) upon the appeal bond. Record, p 22.

POINTS.

I. A thorough examination of the Kansas statutes shows that the judgment was in full force and conclusive in Kansas, and being so, was equally binding and conclusive in New Mexico, notwithstanding the omissions of the Clerk of Morris County, Kansas, (if any,) in making up the record.

"The trial by jury may be waived by the parties in actions arising on contract, and with the assent of the court in other actions, in the following manner: By the consent of the party appearing when the other party fails to appear at the trial by himself or attorney; by written consent in person or by attorney; by oral consent in open court entered on the journal." Kansas Stat., (1868,) p. 684, Sec. 289.

There is no statute of Kansas which provides that unless the jury trial shall *not* be waived, as above prescribed, the judgment *shall be void;* and to make it so, it would have so to be declared in terms.

"A mistake, neglect, or omission of the clerk shall not be a ground of error until the same has been presented and acted upon in the court in which the mistake, neglect, or omission occurred." Stats. of Kansas, (1868,) p. 741, Sec. 563.

"The District court shall have power to vacate or modify its own judgments or orders at or after the term at which such order was made: First—by granting a new trial for the cause, within the time and in the manner prescribed in Sec. 310;

second—by a new trial granted in proceedings against defendants constructively summoned, as provided in Sec. 72; third—for mistakes, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; fourth—for fraud, practised by the successful party, in obtaining the judgment or order; fifth—for erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings: sixth—for the death of one of the parties before the judgment in the action: seventh—for unavoidable casualty or misfortune, preventing the party from prosecuting or defending: eighth—for errors in a judgment, shown by an infant in twelve months after arriving at full age, as prescribed in Sec. 314; ninth—for taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time or place of taking such judgment."

"The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action The motion to vacate a judgment, because of its rendition before the action stood regularly for trial, can be made only in the first three days of the succeeding term." Kansas Statutes. (1868.) pp. 742–3, Sec. 568.

"Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions 4, 5, and 7 of Sec. 568, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or person of unsound mind, and then within two years after removal of such disability. Proceedings for the causes mentioned in subdivision 3 and 6 of the same section shall be within three years, and in subdivision 9 within one year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby." Kansas Stats. (1868) pp. 743, Sec. 569.

Exactness in furnishing *all the statutes* of Kansas having a bearing upon, or affecting the subject, has been pursued, at the expense of an apparently undue enlargement of this brief.

The record shows that at the trial in Kansas the defendant was represented by *two* attorneys, and that the cause was heard upon the pleadings, evidence, and *argument of counsel;* that not only were depositions read, but 'evidence of divers persons, who were sworn and testified in open court," was considered. The presumption that the trial by jury was waived "by oral consent in open court" is so violent as to be conclusive, in view of the entire absence of subsequent proceedings, and equally so that the clerk omitted to enter the same.

Now, as Maxwell made no objection, had no exception, took no step either to vacate or set aside the judgment in Morris County, could the court in New Mexico, or can this court, go farther than even the appellate court in Kansas could; *i. e.*, correct an error which they are forbidden by law to do, unless the same is presented first in the court where committed?

The judgment being binding in Kansas, it is equally binding in every other State or Territory in the Union.

Gulick vs *Loder*, 1 Green, N. J., 60.
Hampton vs. *McConnell*. 3 Wheaton, 234.
Coldwell vs. *Carrington*, 9 Peters, 86.
Warren Co. vs. *Ætna Co.*, 2 Penn., 502.

And this even although the cause might have been commenced by attachment, the *defendant having appeared.*

Lincoln vs. *Tower*. 2 McLean, 473.
Westervelt vs. *Lewis*, 2 McLean, 511.
Mayhew vs. *Thatcher*. 6 Wheaton, 129

The alleged imperfections of the record of the judgment in Kansas can not now be asserted by plaintiff in error, because the failure on his part to take steps to reverse the same is the highest evidence of his acquiescence therein.

Evans vs. *Perciful*, 5 Pike. 424

Irregularity in a judgment can only be taken advantage of on motion.

Bennett vs. *Couchman*, 48 Barb. R , 83.

Judgment of a court can not be disturbed by mere inferential evidence of a want of jurisdiction.

Kelsey vs *Murray*. 40 Barb. R., 231

Exemplification, though slovenly, if authentic, is entitled to have the credit and effect of fair record.

Stephen vs. *Coleman*, 1 Brevard R , 232.

II. A declaration on a judgment relies solely on the judgment itself, and not on the proceedings by which it has been preceded. The entry of the judgment gives force and validity to the record of the previous proceedings, and not the record of those proceedings to the entry of the judgment. If the judgment itself is perfect, and the adverse party made no objection to any previous proceedings, all defects and irregularities which may have preceded the judgment, are cured.

Grignon's Lessees vs. *Astor*, 2 How., 319.
Voorhees vs *Bank U. S*, 10 Peters, 449.

The court in New Mexico could not pass upon the proceedings anterior to the judgment, in Kansas. The only requirement is that the judgment itself be fully set up, which was done.

Mills vs. *Duryee*, 7 Cranch, 481.

McElmoyle vs. *Cohen*, 13 Peters, 312.

The record of the Kansas judgment shows that defendant, though in court, took no objections or exceptions or steps to reverse the judgment, and, having failed to do so then, he can not have any advantage of it here. This court, in the case of Voorhees *vs.* Bank U. S., have said:—

> It is among the elementary principles of the common law, that whoever would complain of the proceedings of a court must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity; or if there is a defect in the form or manner in which he is sued, he may assign these defects specially, and the court will not hold him answerable till such defects are remedied. But if he pleads to the action generally, all irregularity is waived, and the court can decide only on the rights of the parties to the subject matter of controversy; their judgment is conclusive, unless it appears on the record that the plaintiff has no title to the thing demanded, or that in rendering judgment they have erred in law; all defects in setting out a title or in the evidence to prove it are cured as well as all irregularities which may have preceded the judgment.
>
> So long as this judgment remains in force, it is in self evidence of the right of the plaintiff to do the thing adjudged and gives him a right to process to execute the judgment. The errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, &c., &c.
>
> *Voorhees* vs. *Bank U. S.*, 10 Peters, 449.

III. Judgments of court are always presumed to be regular, and are conclusive between parties until reversed; and this has been held in many cases, where even no jurisdiction was shown in the record.

McCormick vs. *Sullivan*, 10 Wheaton, 192.

Ex Parte *Watkins*, 3 Peters, 193.

Huff vs. *Hutchinson*, 14 How. R., 586.

Rathbone vs. *Terry*, 1 R. Island R., 73.

Briggs vs. *Clark*, 7 How. (Miss.) 458.

Pender vs. *Felts*, 2 Sm. & M., 535.

Coleman vs. *McKnight*, 4 Miss., 83.

Venable vs. *McDonald*, 4 Dana, 336.
Tompson vs. *Talmie*, 2 Peters, 157.
Harvey vs. *Tyler*, 2 Wall., 341.
Cocke vs. *Halsey*, 16 Peters, 71.
Honor vs. *Fish*, 1 Pick., 435.
Livermore vs. *Herschell*, 3 Pick., 33.
Saxton vs. *Chamberlain*, 6 Pick., 223.
Cissell vs. *Briggs*, 9 Mass., 462.
Andrews vs. *Montgomery*, 19 Johns R., 162.
Thomas vs. *Robinson*, 3 Wend., 267.
Grignon vs *Astor*, 2 How., 319.
Mills vs. *Duryee*, 7 Cranch, 481.
McElmoyle vs. *Cohen*, 13 Peters, 312.

IV. Stewart cannot again sue Maxwell for the same cause of action as that upon which the Kansas judgment was founded. The plea of "former recovery" would be fully sustained by the record of the judgment itself, which sets forth, with remarkable fullness, the contract between the parties and the breach thereof, which furnished the plaintiff his cause of action.

The record is as complete as it *can be made*. The clerk certifies that it "is a true and faithful copy of the record of the proceedings had in said court in the said cause."

If there has been any diminution of the record, has it been to the injury of the defendant? Then he had his remedy in the appellate courts of Kansas. He availed not of this, and now, after the lapse of years, upon every principle of law as well as justice, is estopped from asserting any errors anterior to the judgment, at least in this tribunal.

Expedit reipublicæ ut sit finis litium.

S. B. ELKINS,
FRED. W. JONES,
Counsel of Appellee.

R Phillips
of Counsel